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Professional Regulation Newsletter

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Saskatchewan Court Upholds Findings of Professional Misconduct for Nurse's Social Media Posts

In the recently released decision of *Carolyn Strom v. The Saskatchewan Registered Nurses' Association* (2018 SKQB 110), the Saskatchewan Court of Queen's Bench upheld a decision of the Discipline Committee of the Saskatchewan Registered Nurses' Association (the "SRNA"), which had found that one of its members had engaged in off-duty professional misconduct through her use of social media.

Background

In February, 2015, Ms. Carolyn Strom ("Ms. Strom"), a nurse registered with the SRNA, posted comments on her Facebook page and on Twitter criticizing the care her grandfather had received prior to his death at a care home facility. In her post, Ms. Strom stated the name of the care home facility and requested that those in charge of decision making at the care home facility give the staff members a "refresher" on end of life care. She also expressed her dismay in having to ask people in the healthcare profession to have more compassion. She later responded to comments on Facebook related to her post, questioning whether staff actually cared about the people they worked with and the need to bring public attention to the matter. Ms. Strom stated, "As an RN and avid healthcare advocate myself, I just HAVE to speak up!"

Ms. Strom proceeded to use Twitter to send a Tweet to both Saskatchewan's Minister of Health and the Leader of the Opposition Party with a link to her Facebook post and comments, which then permitted her post to become accessible to anyone who followed the link. Ms. Strom had not formally discussed any concerns she had about the

care of her grandfather with people working at the care home facility, other than once making a complaint related to an expired liquid hand sanitizer.

As a result of the above-noted posts, the care home facility made a complaint to the SRNA, which brought disciplinary proceedings against Ms. Strom, alleging that she had engaged in professional misconduct contrary to *The Registered Nurses Act, 1988* of Saskatchewan (the "*Act*").

On October 18, 2016, the Discipline Committee of the SRNA heard the matter and concluded that Ms. Strom had engaged in acts of professional misconduct contrary to s. 26 of the *Act* and various provisions of the Canadian Nurses Association *Code of Ethics for Registered Nurses* (the "*Code*"). The Discipline Committee found that Ms. Strom had: clearly identified herself as a registered nurse in order to give credibility and legitimacy to her comments; was aware that her comments would be available to the public and widely viewed; failed to first obtain all of the relevant facts regarding her grandfather's care; and, did not follow the appropriate organizational channels to express her concerns. Interestingly, the Discipline Committee did not find that Ms. Strom was in breach of the SRNA's own *Standards and Foundation Competencies for the Practice of Registered Nurses* (the "*Standards*").

Ms. Strom was ordered by the Discipline Committee to pay a $1,000.00 fine and $25,000.00 for costs of the proceedings. Ms. Strom appealed this decision to the Saskatchewan Court of Queen's Bench (the "Court").

The Court's Ruling

The Court first determined that the appropriate standard of review was reasonableness, as the Discipline Committee was interpreting the SRNA's governing legislation, with which it has considerable knowledge and expertise.

The Court then considered whether Ms. Strom's off-duty conduct could be subject to discipline by the SRNA. Ms. Strom had made the online comments while she was on maternity leave and she did not work at the care home facility in question. Ms. Strom therefore argued that she had made the online comments as a private individual and that the *Act* and *Code* did not apply to this situation. The Court however, noted that Ms. Strom had identified herself as a registered nurse in making these online comments in order to give her comments credibility and legitimacy. The Court agreed with the Discipline Committee that this connected her off-duty comments to her profession.

Ms. Strom further argued that no provisions in the *Act*, the *Code*, or the *Standards* explicitly stated that a member of the SRNA's off-duty conduct is subject to discipline. While the Court agreed with this observation, it held that the *Act* gives the SRNA broad powers to determine what constitutes "professional misconduct" and how the rules governing the conduct of registered nurses would apply. The Court concluded that in this regard, the Discipline Committee had carefully considered the matter and made the decision that Ms. Strom's off-duty conduct could be subject to discipline, which was reasonable.

The Court further noted that it was open to the Discipline Committee to make inferences about how Ms. Strom's comments harmed the standing of the nursing profession as a whole, as well as the reputation of and the public's confidence in the nursing staff at the care home facility. The Court referred to the decision of the

Alberta Court of Appeal in *Erdmann v. Institute of Chartered Accountants of Alberta*, 2013 ABCA 147, which had held that private behaviours of professionals which derogate from standards of conduct essential to their respective professional reputations cannot be permitted and can be subject to discipline. The Court concluded that even if the Discipline Committee could have interpreted Ms. Strom's actions differently, its decision that Ms. Strom engaged in acts of professional misconduct by causing harm to the reputation of the nursing profession fell within the reasonable range of possible and acceptable outcomes.

The Court also considered whether the Discipline Committee reasonably concluded that the infringement of Ms. Strom's freedom of expression pursuant to s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), was justified under s. 1 of the *Charter*. The Court found that the Discipline Committee had considered the need to balance a member's freedom of expression with the objective of governing registered nurses in the best interests of the public and the profession. The Discipline Committee concluded that the infringement of s. 2(b) of the *Charter* was justified, due to the resulting harm to the nursing profession and the fact that Ms. Strom had other avenues of expressing her concerns which would not have harmed registered nurses and the nursing profession as a whole. The Court found that the Discipline Committee appropriately balanced the competing interests and reasonably concluded that the infringement of Ms. Strom's freedom of expression was justified.

Finally, the Court noted that the Discipline Committee conducted a "thoughtful and thorough review" of the penalty considerations, noting that the SRNA's costs exceeded almost six times the amount awarded against Ms. Strom. The Court ultimately dismissed the appeal, concluding that the Discipline Committee's decision was reasonable. In media reports, Ms. Strom has indicated her intention to appeal this decision to the Saskatchewan Court of Appeal.

Takeaways

This decision highlights how "off-duty" conduct, particularly that on social media, can be increasingly subject to professional discipline and how professional regulatory bodies must engage in a comprehensive review when assessing complaints related to the off-duty conduct of their members, particularly with respect to members' use of social media. Professional regulatory bodies are tasked with considering whether such off-duty conduct can be subject to discipline in accordance with their governing legislation, codes of conduct, rules and regulations. Accordingly, it will be useful for professional regulatory bodies to conduct a formal review of these governing materials in order to determine whether the expectations the regulatory bodies have of their members with respect to their off-duty conduct are transparent, not only to members of the public, but to the members themselves.

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Divisional Court finds that a Hearing Panel did not Lose Jurisdiction when one Member Withdrew Prior to Rendering its Decision

In *Chin v. The Law Society of Upper Canada*, 2018 ONSC 2072, the Divisional Court upheld a decision by the Law Society of Upper Canada (the "Law Society") to revoke a lawyer's licence to practice law after she knowingly participated in fraudulent real estate transactions.

Background

A three-member panel of the Law Society's Hearing Division was originally constituted to hear the matter, however, following the conclusion of the hearing and prior to the panel rendering its decision, one of its members withdrew after being appointed as a judge. The Member was notified of this and was given the opportunity to express any concerns she had, but she advised the Hearing Panel that she was content to proceed with the two remaining members and for them to render a decision. The remaining two members of the Hearing Panel later revoked the Member's licence to practice law after finding that she had actual knowledge of or was reckless in six fraudulent residential real estate transactions. The member appealed to the Law Society's Appeal Division which upheld the Hearing Panel's decision and penalty. The Member then appealed to the Divisional Court making the following arguments:

1. The Hearing Panel had no jurisdiction to render a decision on behalf of only two of the three original panel members;

2. The Hearing Panel placed undue reliance on an expert report that generically described "red flags" in respect of possibly fraudulent activity; and

3. The Hearing Panel's determination on the merits was unreasonable because it failed to consider her intention to participate in fraud separately in each of the six transactions.

Decision

On the issue of jurisdiction, the Member argued that the two remaining members did not have jurisdiction to render a decision due to provisions of the *Law Society Act* and its regulations, which require that three members be assigned "to determine" the merits of a proceeding.

The Court found that these provisions only require that three members be assigned at the beginning of a matter. The Court further found that s. 4.4(1) of the *Statutory Powers Procedure Act* governs when a member who has participated in a matter becomes unable to complete the hearing. This provision states that in such circumstances, the remaining members may complete the hearing and render a decision.

Turning to the expert report issue, the Court noted that the Member was given an opportunity to challenge the admissibility of the report and to raise concerns about how the Hearing Panel relied upon it, but she did not do so until appealing to the Divisional Court.

Generally, there is a prohibition on raising issues for the first time on appeal. The Court nevertheless considered the Member's argument and found that there had been no over-reliance on the report. The report merely assisted the Hearing Panel in understanding the possible warning signs of fraud in real estate transactions.

Finally, the Court considered whether the Hearing Panel's determination on the merits was unreasonable. The Court noted that the Hearing Panel's decision consisted of 39

pages of detailed reasons, in which the panel members considered each of the six transactions in turn. The panel members also considered the Member's actions, explanations, credibility, experience, and duties to her clients.

The Court held that the Hearing Panel appropriately concluded on the basis of the evidence that the Appellant understood her obligations but did not protect her clients' interests.

She clearly disregarded instructions from clients, knowingly permitted the fabrication of documentation, lied under oath, and provided explanations for her actions that strained credulity. The Court upheld the Hearing Panel's decision and dismissed the appeal.

Takeaways

1. A panel may complete a hearing and render a decision even when some of its members have withdrawn as long as there is no express provision in its governing legislation which would override the provisions of the *Statutory Powers Procedure Act*.

2. Issues raised for the first time on appeal and not before the hearing panel will rarely be permitted or be successful.

3. The Courts will defer to a hearing panel's determinations in its area of expertise particularly where the panel has provided detailed reasons for its decision.

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Pharmacists Who Accepted Rebates Committed Acts of Professional Misconduct

In *Ontario (College of Pharmacists) v. Hanna and Varga,* 2018 ONCPDC 8, the Discipline Committee of the Ontario College of Pharmacists (the "College") found that two members had committed professional misconduct by accepting rebates contrary to provincial legislation.

Background

Hanna and Varga (the "Members") were two pharmacists who worked as directors of CWC Pharmacies (Ontario) Ltd. ("CWC"). Costco Wholesale Canada Ltd. ("Costco") was the sole shareholder of CWC. The Members were responsible for negotiating the supply of generic drugs for Costco pharmacies across Ontario. CWC purchased drugs from manufacturers on a list of preferred suppliers as determined by Costco.

Since 2013, rebates and professional allowances paid by drug manufacturers to pharmacies in exchange for listings have been prohibited in Ontario under the *Drug Interchangeability and Dispensing Fee Act* and the *Ontario Drug Benefit Act*.

In 2015, a former sales representative of a drug manufacturer and former supplier to Costco filed a complaint with the College alleging that the Members required a "minimum 60% rebate" in exchange for listings. The Members admitted that they sought "support" from suppliers in the form of advertising services, which they believed did not contravene the prohibition on rebates and professional allowances. CWC and Costco then sought guidance from the Ministry of Health and Long-Term Care on whether its advertising contract payments were prohibited. They advised the Ministry

that they would suspend those payments in the interim.

The Decision

Both of the Members admitted to professional misconduct due to their soliciting of financial support through the advertising services and entered into an agreed statement of facts, which the Discipline Committee heard and determined that those facts supported a finding of professional misconduct that the Members' actions were unprofessional, but not disgraceful or dishonourable because the behaviour did not involve dishonest or immoral elements.

The Members and the College also agreed upon a joint submission on penalty that the Members should each receive a reprimand, pay a $20,000.00 fine to the Minister of Finance, complete a jurisprudence exam, pay costs of $30,000.00 to the College and the Members would also allow the College to monitor payments coming from drug manufacturers for a period of 12 months.

The Discipline Committee accepted the joint submission on penalty, noting that while the primary purpose of a disciplinary proceeding is to protect the public, the interests of the profession as a whole and the circumstances of the individual members must also be considered.

The Discipline Committee also noted that the $20,000 fines were among the largest fines imposed by the College, thus serving as an effective deterrent. At the same time, the proposed penalties also recognized the fact that the Members were operating in an area of legal uncertainty, believed that their conduct was permitted, had no disciplinary history with the College, did not personally benefit from their actions, cooperated fully with the College and voluntarily ceased the advertising programs before the College sought an order requiring them to do so.

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Administrative Tribunals can sub-delegate their authority to summarily dismiss complaints

In *Best v. Canada (Attorney General)*, 2017 FC 1145, the Federal Court held that an administrative body, the Canadian Judicial Council ("CJC"), was entitled to sub-delegate to its Executive Director, the authority to summarily dismiss complaints through an early screening process, and that its decision to summarily dismiss a complaint was reasonable.

Background

A corporation controlled by the Applicant sued 62 defendants in the Ontario Superior Court of Justice. Its action was stayed and several defendants obtained costs orders against the Applicant personally, which he failed to pay. In 2010 Justice Shaughnessy found the Applicant to be in civil contempt and issued a warrant for his arrest and imprisonment. The 2010 warrant was stayed until 2013, when Justice Shaughnessy lifted the stay and ordered the Applicant to be incarcerated. The Applicant alleged that Justice Shaughnessy changed the original 2010 warrant by adding "no remission", thus increasing the length of his sentence and made a complaint concerning Justice Shaughnessy's conduct to the CJC. The Executive Director of the CJC dismissed the complaint in an early screening process. The Applicant then sought to judicially review the Executive Director's decision to the Federal Court, arguing that the early screening of complaints was

unconstitutional and an unlawful delegation of the CJC's authority.

The Decision

The Federal Court rejected this argument and upheld the Executive Director's decision. The Court noted that s. 63(2) of the *Judges Act* provides that the CJC *may* investigate complaints, meaning that it is not always obligated to do so. The CJC is not a court or an adjudicative tribunal tasked with adjudicating complainants' rights. Even though judges sit as members of the CJC, they are doing so as members of an administrative tribunal and not in their judicial capacity. For this reason, it did not matter that the Executive Director who conducted the early screening and dismissed the Applicant's complaint was not a judge.

The CJC's *Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* allows for early screening of complaints and was not an unlawful delegation of authority. While administrative bodies that have been delegated discretionary power should generally exercise that power personally, the law is "generally permissive of sub-delegation of administrative functions, as opposed to a delegation of legislative, judicial or quasi-judicial functions". The early screening of complaints is an administrative function because it does not decide any legal rights, duties, or responsibilities. Furthermore, the sub-delegation of administrative functions arises out of the necessity to assist administrative tribunals in fulfilling their statutory duties and purposes. The Court therefore found that the CJC was permitted to sub-delegate the early screening of complaints to its Executive Director.

The Court then found that the Executive Director's dismissal of the Applicant's complaint was reasonable. While a judge's conduct in the course of judicial decision-making can constitute judicial misconduct, this will typically only occur where there is a substantiated allegation that the decision was tainted by an improper motive or bad faith. In this case, the evidence did not support any such finding.

The Court noted that it is open for a judge to amend a previously issued warrant for contempt. The 2010 warrant was silent on the issue of remission, so the 2013 warrant and its added specification of "no remission" could be interpreted in different ways. On the one hand, it could be simply putting into words Justice Shaughnessy's original intentions when he issued the 2010 warrant. It could also be seen as an amendment to the 2010 warrant that effectively increased the Applicant's sentence without fair notice. Even if that were the case however, the proper remedy was an appeal not submitting a complaint to the CJC. In this case the Ontario Court of Appeal had already dismissed the Applicant's appeal, and leave to appeal to the Supreme Court of Canada had also been denied.

As a result, the Court dismissed the application for judicial review, finding that the Executive Director of the CJC was entitled to dismiss the Applicant's complaint and his decision to do so in this case was reasonable.

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Court Expands Access to Tribunal Records

In *Toronto Star v. AG Ontario*, 2018 ONSC 2586 (CanLII), the Ontario Superior Court of Justice (the "Court") held that the

personal information exemption found in s. 21 of the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 ("*FIPPA*"), violates the open courts principle embedded in s. 2(b) of the Canadian Charter of Rights and Freedoms (the "*Charter*").

Background

After experiencing difficulties in obtaining access to tribunal schedules prior to a hearing and with inspecting or copying adjudicative records following a hearing, the Toronto Star brought a constitutional challenge alleging that *FIPPA* burdens the right of access to adjudicative records and is thereby contrary to the open courts principle embedded in s. 2(b) of the "*Charter*".

In particular, the Toronto Star raised two issues. First, the Toronto Star argued that the personal information exemption found in s. 21(1) of *FIPPA* substantively violates s. 2(b) of the *Charter* by creating a presumption of non-disclosure. The Toronto Star argued that the personal privacy exemption is so widely invoked, that it has become the rule rather than an exemption. Secondly, the Toronto Star argued that the delay caused by the notice provisions, time lines, and authorization procedures under *FIPPA* infringe s. 2(b) of the *Charter*. The Toronto Star argued that in effective journalism, time is of the essence. Due to processing delays, in many cases, the newsworthiness of a story fades by the time the production is made by an administrative tribunal.

The Court therefore had to decide whether the personal information exemption found in s. 21(1) of *FIPPA* and the processing delays caused by *FIPPA* procedures violated the open courts principle embedded in s. 2(b) of the *Charter*.

Decision

At the outset, the Court confirmed that adjudicative records include but are not limited to: notice of any hearing, any interlocutory orders made by a tribunal, documentary evidence filed with the tribunal, transcripts of oral evidence given at the hearing, and dockets or schedules of hearings. Adjudicative records do not include documents exchanged between the parties to a hearing and filed with the tribunal in the pre-hearing stage of proceedings.

The Court first considered the substantive issues in *FIPPA*. The Court noted that the definition of personal information is very broad, and that s. 21(1) "sets out a presumption of non-disclosure of personal information and imposes an onus on the requesting party to justify the disclosure of the record." The Court concluded that the statutory imposition of an onus on the requester amounted to an infringement of s. 2(b) of the *Charter*.

Secondly, the Court considered the procedural issues in *FIPPA*. Noting that Canadians expect the most accurate and timely news reports, the Court affirmed that s. 2(b) values are "not served by publication when the speaker has lost his audience and the message to be conveyed has lost its purpose". Stating that most requests are processed within 30 to 45 days, the Court held that processing delays under *FIPPA* burden the freedom of the press and infringe on s. 2(b) rights.

Next, the Court considered whether *FIPPA*'s limits on the freedom of expression are reasonable and justifiable under the *O*akes test.

First, the Court considered whether *FIPPA* has a pressing and substantial objective. The

Court affirmed that *FIPPA* has multiple pressing and substantial objectives which include providing a right to information while protecting the privacy of individuals. Secondly, the Court considered whether the application of *FIPPA* to adjudicative tribunals is rationally connected to its objectives. Agreeing with the Attorney General, the Court held that the inclusion of "adjudicative tribunals in the *FIPPA* regime is rationally connected to the purpose of balancing a right of access against a concern for privacy."

Next, the Court considered the issue of minimal impairment. The Court held that the reverse onus on producing personal information does not minimally impair s. 2(b) of the *Charter*. The Court noted that the open court principle is fundamental and that personal information and privacy concerns are secondary to it. The Court further stated that the open court principle directs administrative tribunals to protect confidentiality only where a party seeking it establishes that it is necessary.

However, the Court concluded that the process to obtain records under *FIPPA* minimally impairs s. 2(b) of the *Charter*. The Court noted that although the process to obtain records under *FIPPA* burdens the exercise of s. 2(b) rights, on a systemic basis, the impairment is minimal. The Court noted that the timelines built into *FIPPA* are designed to make the system operate fairly. Administrators must provide notice to affected parties and provide some amount of time for a response. The Court did however note that there may be individual cases of unjustifiable delay and impairment of rights.

Lastly, the Court considered the question of proportionality. The Court concluded that "the salutary effects of the presumption of non-disclosure of personal information in s. 21 of *FIPPA* do not outweigh the deleterious effects of that measure on the *Charter* right to openness." Agreeing with the Toronto Star, the Court held that emphasizing privacy over openness negatively impacts the press and other stakeholders. For example, regulators have no means to identify chronic offenders, and problematic landlords, police and others cannot be discovered by members of the public who may have to engage with them.

Conclusion

The Court held that *FIPPA* infringes s. 2(b) of the *Charter* in two respects: 1) substantively in respect of the presumption of non-disclosure found in s. 21; and 2) procedurally in terms of the notice provisions, timelines, and authorization for institution heads and the Information and Privacy Commissioner of Ontario to make decisions about access to adjudicative records. The Court held that the Attorney General failed to meet the onus of justification with respect to the substantive breach. The application of ss. 21(1) to (3) and related sections of *FIPPA* pertaining to the presumption of non-disclosure of personal information to adjudicative records were declared unconstitutional and inoperative. The declaration of invalidity was suspended for one year to allow the Attorney General to rework the legislation. The Attorney General has subsequently indicated that it does not plan to appeal this decision.

The Court also clarified that this ruling applies only to those institutions named in the Application, and any other institution listed in the Schedule to *FIPPA* that operates in an adjudicative capacity and that holds adjudicative records. The Court also confirmed that tribunals who do not engage in the *FIPPA* process and answer requests for adjudicative records directly should

examine their procedures to ensure compliance with s. 2(b) of the *Charter*.

Takeaways

1. Adjudicative tribunals that have relied on the *FIPPA* process to determine access to Adjudicative Records, must revamp their process to ensure that it is *Charter* compliant.

2. Adjudicative tribunals that have their own process to release records must ensure that their procedures are *Charter* compliant.

3. The open courts principle trumps privacy concerns.

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